

**FOIA DOCUMENT GUIDE**  
for  
**Information Technology Management  
Office  
&  
State Procurement Office**

Version 2.0  
(Revised August 2002)

**HOW TO RESPOND TO A DOCUMENT REQUEST  
DURING THE PROCUREMENT PROCESS**

This document does not create a binding procedure or create rights or obligations for or against the state. Rather, this document provides recommendations to assist state procurement officers in fulfilling their responsibilities under FOIA.

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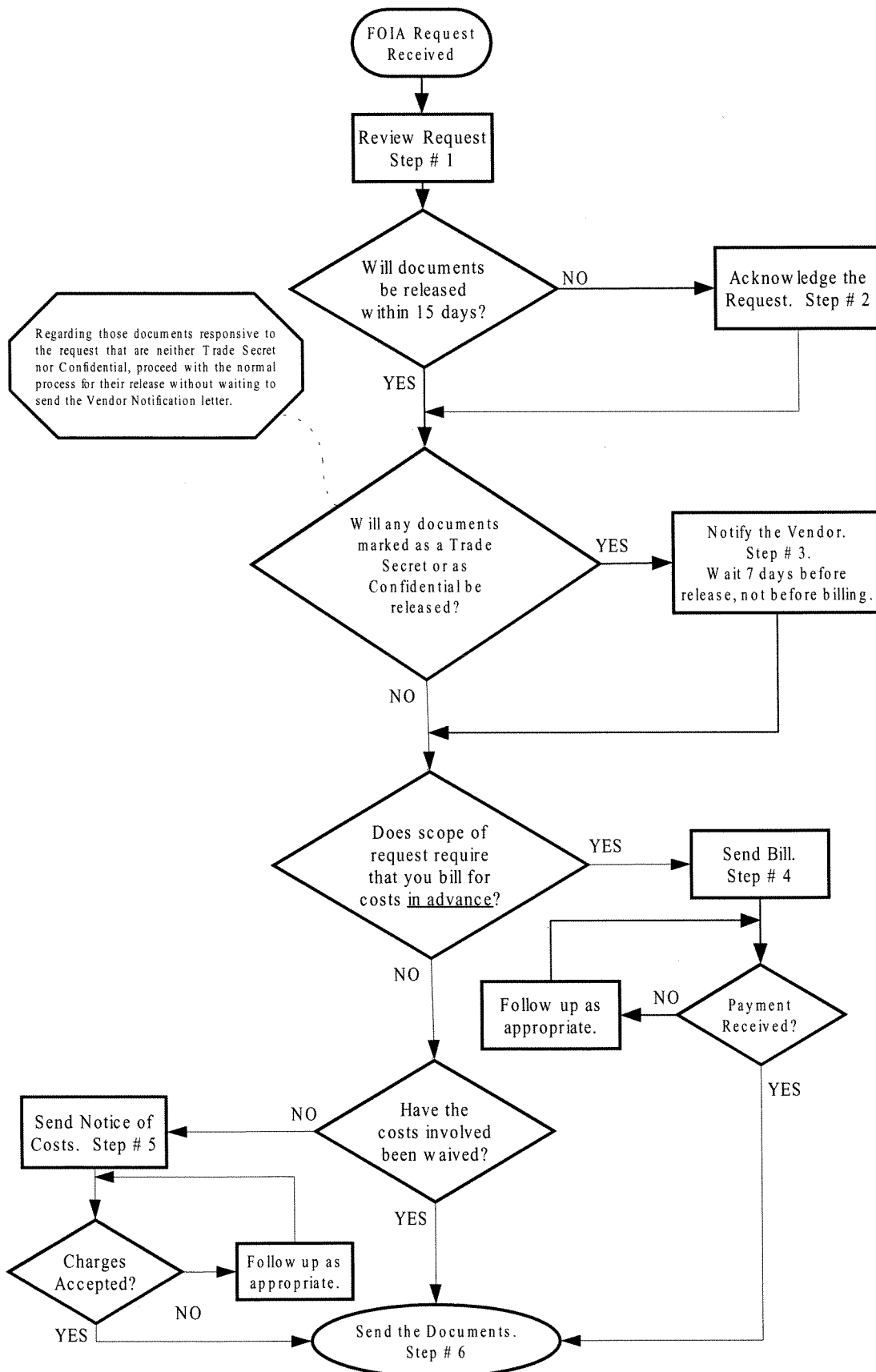
*Budget and Control Board Procedures:*

*News Media Contacts and FOIA Requests*

## HOW TO USE THIS GUIDE

1. This Guide includes both instructions and form letters, which should be used in tandem.
2. This Guide should be reviewed in conjunction with the Board's general policy regarding FOIA requests. A copy is included with this Guide.
3. This Guide recommends a model approach. Notwithstanding the use of words like "shall," "must," or "should," this Guide is not a binding policy or procedure. Whenever you deviate from the recommended approach, consult with your supervisor or legal counsel.
4. This Guide addresses those FOIA requests that seek documents received or generated in connection with the procurement process. This model approach applies only to those solicitations (including Requests for Qualifications) which were issued after the revision date appearing on the cover of this Guide and which include the new model FOIA bidding instructions included with this version of the Guide.
5. This Guide is general in nature and is not intended to address every possible situation. Moreover, this Guide does not address every possible document you may find in a procurement/ contract file. All responses to a FOIA request should be reviewed on a case-by-case basis.
6. Priority should be given whenever a protest or contract controversy is pending before a Chief Procurement Officer.
7. Documents that have been requested pursuant to FOIA should not be destroyed, archived, or returned to the vendor until thirty days after the FOIA request has been answered or denied. Section 11-35-2430 may impose a separate obligation to maintain documents.
8. Document all FOIA requests and your responses in the procurement / contract file.
9. All communications should be in writing or confirmed in writing. E-mail is "in writing."
10. In calculating time under FOIA, count business days for the State. All references in this Guide to time periods should be read as referring to State business days, not calendar days.
11. This Guide requires updating periodically. Statutes can be rewritten or subject to a new interpretation and policies can be amended. This Guide is current as of the revision date appearing on the cover of this Guide.

## FOIA FLOW CHART



## **INTRODUCTION**

Both the Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 through 110 (1991 & Supp. 2000) and the Trade Secrets Act, S.C. Code Ann. §§ 39-8-10 through 130 (Supp. 2000) create criminal and civil liability for failure to follow their mandates. While one statute requires disclosure, the other forbids it. Given this tension, negotiating the requirements of both may be troublesome for buyers. However, a review of these acts' requirements and penalties suggests several ways to avoid some of the more difficult problems.

Under FOIA, any person has the right to inspect or copy any public record of a public body unless those records are exempt from disclosure. (Section 30-4-30.) The statute makes a willful violation of its disclosure requirement a crime. (Section 30-4-110.) For a first offense, FOIA imposes a fine of up to \$100 and a sentence of up to 30 days. In contrast to FOIA, the Trade Secrets Act makes it a crime to "wrongfully" send, deliver, or communicate trade secrets if the person has a reason to believe that the action will both injure the owner of the trade secret and benefit a person other than the owner. (Section 39-8-90.) A person may be fined not more than \$100,000 or imprisoned not more than ten years, or both, for a violation. The statute does not define "wrongfully."

Both these statutes also create some type of civil liability. FOIA allows a party to seek declaratory and injunctive relief to enforce the party's right of access. (Section 30-4-100(a).) If the party prevails, it "may be awarded reasonable attorney fees and other costs of litigation". (Section 30-4-100 (b).) In contrast, the Trade Secrets Act provides civil remedies for the wrongful disclosure (misappropriation) of trade secrets. (Section 39-8-30(c).) Under the Trade Secrets Act, misappropriation includes disclosing the trade secret of another by someone who, at the time of disclosure, had reason to know that his knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. (Section 39-8-20(2)(c)(ii)(B).)

By adding some language to its standard forms, ITMO/SPO may be able to better comply with both these statutes. Assuming that ITMO/SPO has a duty to maintain secrecy under the Trade Secrets Act,<sup>1</sup> ITMO/SPO would not be liable if disclosure were done with the express or implied consent of the trade secret's owner. (Section 39-8-20(2)(c).) Accordingly, our standard solicitation forms should require the vendor's consent to release any information a vendor does not believe is either confidential or a trade secret. Because ITMO/SPO will rely on a vendor's characterization of its information as being either a trade secret or confidential, our solicitations should also require a vendor to indemnify the state if the state incurs damages by relying on such characterizations. Standard bidding instructions that address these goals are included in this Guide. They should be included in solicitations issued by ITMO and SPO.

## **STEP 1 - REVIEWING THE REQUEST**

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<sup>1</sup> Reference for Legal Staff: A recent circuit court order made the opposite assumption. See South Carolina Coin Operators Assoc. v. South Carolina Dep't of Revenue, No. 97-CP-40-1321 (Richland, S.C., Ct. Common Pleas, March 5, 1998) (J. McKellar). Judge McKellar concluded that the legislature would have specifically required DOR to keep certain information secret if any duty of confidentiality existed.

(a) **Instructions:**

After completing "Step #1," you may skip to "Step #6" if (a) you will be releasing the requested documents within 15 business days, (b) you will not be releasing any documents marked "trade secret" or "confidential" or "protected," and (c) the scope of the request does not require you to bill for the costs of responding. See Flowchart.

(b) **General rules:**

(1) ITMO/SPO's obligations under FOIA are only triggered when we receive a written request. E-mail is a "written request."

(2) FOIA obligates the State to release documents, not information. FOIA does not require state employees to answer written questions, to extract information from documents, or to summarize information. However, if it is more efficient for you to simply provide the information, do so.

> Example: You receive a request to release information in a particular format, for example, a list of the evaluators. We have documents that contain that information (evaluation forms), but no documents that summarize the information in the format requested. You have two choices. You can either summarize the information and provide it, or inform the requestor that documents responsive to the request exists but no single document contains the information requested.

(3) FOIA applies to e-mail and documents that exist only on a computer. Personal files, notes, and phone logs are also covered by FOIA.

(4) ITMO/SPO is not obligated to acquire documents from other agencies in order to fully respond to a FOIA request. ITMO/SPO is required to provide all documents in its possession or control. If ITMO/SPO does not have the documents requested but you know where the documents are, tell the requestor.

(5) A request to ITMO/SPO is effective to request any documents at ITMO/SPO or any documents held for ITMO/SPO by the Department of Archives and History. If you know that another section of the Board has documents responsive to the request, forward a copy of the request to that section.

(c) **How to review the request:**

(1) Read the request closely. Provide only what is requested; no more, no less. It is very important to carefully consider how a request is worded. For example, a request for "a copy of the procurement file" is different from a request for "a copy of any and all documents regarding the solicitation." The latter is much broader.

(2) We must respond to the request as written, not as we think the requestor meant it to read. If you believe that the request as written seeks more than the requestor meant to ask for, you can call the requestor and ask them to withdraw their request and to substitute a newer, more narrow request - in writing.

(d) **What to Redact<sup>2</sup>:**

(1) Regarding State Created Documents (Documents created by someone other than competing vendors, such as notes of meetings, phone logs, e-mail, etc):

(i) The Trade Secrets Act, § 11-35-410, and § 11-35-1810 protect information, not documents. *IF RESTRICTED INFORMATION HAS BEEN REPEATED OR RECORDED IN YOUR OWN DOCUMENTS, THAT INFORMATION MUST BE REDACTED BEFORE THE DOCUMENT CAN BE RELEASED.* For example, assume you send an e-mail to the using agency explaining why a promising vendor is non-responsive. Also assume that the reason you found the vendor non-responsive involved information from the vendor's proposal that had been marked as a trade secret. If any of the trade secret information is repeated in the e-mail, that information would have to be edited out before the e-mail could be released.

(ii) Remove any material subject to Mandatory Withholding. The Mandatory Withholding List, included in this Guide, lists those types of documents that must be withheld. If you have concerns about releasing a particular document, ask legal counsel.

(2) Regarding Vendor Created Documents (Documents or information provided by competing vendors, such as bids or proposals):

(i) *NO INFORMATION MARKED "CONFIDENTIAL" OR "TRADE SECRET" OR "PROTECTED" MAY BE RELEASED WITHOUT THE EXPRESS APPROVAL OF EITHER LEGAL COUNSEL OR A BUYER'S SUPERVISOR.*

Make a "common sense" review of the documents requested. Normally, no information marked "confidential" or "trade secret" or "protected" will be released. If information that has been marked as "confidential" or "trade secret" or "protected" is **obviously** not subject to protection, or if the entire bid or proposal has been marked as "confidential" or "trade secret" or "protected," identify to your supervisor or to legal counsel exactly what information you believe must be disclosed, even though the Vendor has claimed protection.

(ii) Remove any material subject to Mandatory Withholding. The Mandatory Withholding List, included in this Guide, lists those types of documents that must be withheld. Hopefully, all information on the Mandatory Withholding List will have already been marked as confidential or trade secret or

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<sup>2</sup> The term "redact" means to edit out. The term is used as a shorthand for editing out any information that must be removed before a document is released to another.

protected. As always, if you have concerns about releasing a particular document, ask legal counsel.

(iii) *Documents Protected by Confidentiality Provisions:* If a contract results from the solicitation and includes a provision addressing confidentiality, the state may have a contractual obligation not to disclose any documents protected by the confidentiality provision. Such contractual obligations may be substantially limited by our obligation to comply with FOIA. Discuss this issue with legal counsel.

(iv) *Copyrighted Materials:* <reserved>

(3) Regarding Particular documents: This Policy includes four Checklists For Releasing Particular Documents. These checklists explain which documents are generally available at a specified point in the procurement process. Absent special permission, documents should not be released before these checklists allow.

(e) **How to Redact:**

(1) Method: If either a sentence or paragraph has been edited out of a page or one or more pages have been removed from a document, then the document has been redacted. When documents are redacted, you must leave some indication that something was taken out. For example, if you pull three pages from a proposal before releasing it, your letter should indicate which pages were removed. Likewise, if you delete the last paragraph on a page before releasing the proposal, you must somehow communicate what was deleted. When less than an entire page is redacted, you can indicate the redaction by either (a) stating what was redacted in your letter, (b) marking out the redacted material with a black marker, such that the markings show up on copies, or (c) white out the redacted material and stamp the word "REDACTED" across the area deleted.<sup>3</sup>

(2) How Much: Redact as little as possible. If the information for which protection is claimed is found only in one sentence or paragraph, redact that sentence or paragraph from the page and release the remainder of the page. Of course, you can only be as specific as the vendor was in claiming protection.

(f) NOTWITHSTANDING ANY SUGGESTIONS IN THIS POLICY REGARDING WHAT DOCUMENTS TO RELEASE OR WHEN, RAISE ANY CONCERNS YOU HAVE WITH YOUR SUPERVISOR OR LEGAL COUNSEL, ESPECIALLY IF YOU ARE ASKED TO DISCLOSE ANY DOCUMENTS YOU THINK MIGHT IMPAIR THE COMPETITIVE PROCESS OR NEGATIVELY IMPACT THE STATE'S BEST INTEREST.

(g) **Billing for FOIA Costs:** The *Budget and Control Board Procedures: News Media Contacts and FOIA Requests (dated 11/12/98)* establishes guidelines for

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<sup>3</sup> Legal counsel keeps a rubber stamp that reads "REDACTED".



when you must bill for FOIA costs. A copy is attached. Depending on the amount, costs for responding to a FOIA request may be waived, may be billed at the time the documents are released, or may be billed in advance. See Step #4.

- (h) **Responsiveness:** According to the standard bidding instructions included with this Guide, the State may determine a bid or proposal nonresponsive if a portion of the bid or proposal is improperly marked as confidential or trade secret or protected. As a practical matter, the better approach is to treat this type of noncompliance as a minor informality. Based on your judgement of the State's best interest, you may either (a) require the Offeror to correct the minor informality [i.e., remark their bid/proposal correctly], or (b) waive the minor informality. If you either waive or allow correction of the informality, section 11-35-1520(13) requires that your action be documented in writing. Any documentation to an offeror that accepts a written correction should include the following statement:

Pursuant to section 11-35-1520(13), the State hereby accepts the corrections to your bid / proposal dated \_\_\_\_\_ which concerned the bidding instructions entitled Submitting Confidential Information. Any remaining noncompliance with the instructions for Submitting Confidential Information is hereby waived. Neither the acceptance of this correction nor the waiver of any remaining noncompliance should be considered as an agreement by the State that you have properly marked your bid / proposal in accordance with the bidding instructions for Submitting Confidential Information.

- (i) **Go to Step #2.**

## **STEP 2 - ACKNOWLEDGING THE REQUEST**

If you will be responding to the request and releasing the appropriate documents within 15 days, skip to Step #3.

If you will not be responding to the request and releasing the appropriate documents within 15 days, you must notify the person making the request whether any documents will be withheld and, if so, why.<sup>4</sup>

See Form Letter #1.

Go to Step #3.

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<sup>4</sup> According to the statute, the State "shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor." Section 30-4-30(c).

### **STEP 3 - NOTIFYING THE VENDOR**

If you are not releasing any documents marked "confidential" or "trade secret" or "protected," skip to Step #4. Otherwise, follow the instructions below:

Before documents marked as "confidential" or "trade secret" or "protected" will be released, ITMO/SPO will give the Offeror that authored the document advanced notice of the document's release. If you have been authorized by legal counsel or your supervisor to release such documents, send a "Notice" letter 7 business days before any documents may be released. [You need not wait 7 days to release information that has not been marked.] The notice letter should (a) specify exactly what is being released, (b) include copies of all "marked" documents that you will be releasing, and (c) include a copy of the FOIA request. You should (a) fax the notice if possible and save your fax confirmation report, and (b) send the letter by certified mail. Retain your certified mail receipt.

See Form Letter #2.

Go to Step #4

#### **STEP 4 - BILLING FOR COSTS - IN ADVANCE**

According to the *Budget and Control Board Procedures - News Media Contacts and FOIA Requests (dated 11/12/98)*, if the cost of responding to a FOIA request is estimated at \$200 or more, then you must request payment in advance.

If the cost of responding to the request is estimated to be \$200 or more, then a minimum deposit amounting to at least half of the estimated costs will be required.

If you won't be billing in advance for the cost of responding, skip to Step #5. Otherwise, follow the instructions below:

Send a letter outlining our standard billing procedure, outlining the costs involved in responding to this FOIA request, and explaining that the information requested will be released after the charges have been paid. See Form Letter #3.

Billing for Staff Time: The Board's procedures state: "If the FOIA request requires approximately one hour or more of staff time, the charge would be based on the hourly wage of the employee(s) responding to the request." To determine your hourly wage, divide your annual gross salary by 2,080.<sup>5</sup> (This method is consistent with the Board's method for determining the hourly rate by which State employees are paid overtime.) Note: The time legal counsel spends providing advise on a FOIA request can not be billed. If a temporary worker is hired to assist in responding to a FOIA request, that worker's costs can be billed.

After payment is received, go to Step #6.

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<sup>5</sup> 40 hours per week x 52 weeks per year = 2,080 hours per year.

## **STEP 5 - NOTICE OF COSTS**

According to the *Budget and Control Board Procedures - News Media Contacts and FOIA Requests (dated 11/12/98)*, you can waive (i.e., not charge for) costs if (a) the request involves copying less than 50 pages and involves less than one hour of staff time, and (b) will benefit the public interest. If you do not need to bill for the cost of responding, i.e., the cost is waived, skip to Step #6. Otherwise, follow the instructions below:

Send a notice outlining an estimate of the costs involved in responding to this FOIA request and requesting written or verbal acceptance of those charges. See Form Letter #4. If the acceptance of costs is verbal, make a record of the conversation for your FOIA file.

Go to Step #6

## **STEP 6 - RESPONDING TO THE REQUEST**

- ☐ If appropriate, has payment been received?
- ☐ If appropriate, have the estimated costs been accepted?
- ☐ If appropriate, has 7 days passed since the Notify Vendor letter was sent?

Send a letter to the Requestor with copies of the documents requested. Letter should include a comprehensive list of all documents released and a list of any pages you did not release.

See Form Letter #5

## **HANDLING OBJECTIONS**

BY REQUESTOR: If a Requestor objects that he is entitled to more information than you produced, or contends that he is entitled to information sooner than this procedure allows, discuss the Requestor's objections with legal counsel. If a protest is pending, the Chief Procurement Officer or legal counsel may, consistent with the Freedom of Information Act and the Consolidated Procurement Code, exercise discretion to release otherwise exempt material. In no case should you release information identified by the vendor as trade secrets or confidential information or protected information without the consent of your supervisor or legal counsel.

BY VENDOR WHOSE DOCUMENTS ARE BEING RELEASED: (1) If a Vendor objects to the release of material not marked "confidential" or "trade secret" or "protected," the information will typically be disclosed notwithstanding the objection. Such calls can be referred to legal counsel. (2) If a Vendor responds to a Notice letter by objecting to the release of material marked "confidential" or "trade secret" or "protected," contact legal counsel.

## CHECKLISTS FOR RELEASING PARTICULAR DOCUMENTS

1. The following checklists identify a number of different documents that may be available in the procurement file. For any given procurement, these documents may or may not exist and may be identified by some other name.
2. The following checklists recommend when, with reference to a specific point in the procurement process, you should ordinarily release particular types of documents. These recommendations assume an ordinary, run-of-the-mill procurement process. IF YOU ARE ADDRESSING A FOIA REQUEST IN THE CONTEXT OF A CREATIVE OR UNUSUAL PROCUREMENT PROCESS, CONSULT WITH YOUR SUPERVISOR OR LEGAL COUNSEL AND EXPLAIN THE SPECIAL CIRCUMSTANCES.
3. If you intend to release documents before these checklists recommend, consult with your supervisor or legal counsel.



## Checklists For Releasing Particular Documents

### Prior to Opening

- ☐ **Justification for Procurement Method**
- ☐ **Determination For Use of a Multi-Term Contract Form**
- ☐ **Evaluation Panel Briefing Instructions**
- ☐ **Solicitation Document (Final Form):** Release only after issued.
- ☐ **Solicitation Amendment Documents:** Release only after issued.
- ☐ **Approval to Use RFQ**
- ☐ **Recommended Vendor Mailing List** [List of vendors generated by Buyer or agency prior to issuance of solicitation or RFQ that lists vendors to whom the state will send a gratuitous copy of the solicitation or RFQ.]

## Checklists For Releasing Particular Documents

### After Opening, Prior to Notice of Intent to Award

- ☐ **Bid Tabulation (all solicitation types)**
- ☐ **RFQ Response List / Tabulation**
- ☐ **IFB/RFQ Mailing List:** [List of vendors to whom IFB or RFQ documents have been mailed.]
- ☐ **RFQ Selection / Ranking List (for IFB or Fixed Price Bidding**
- ☐ **Pre-proposal/ Pre-Bid Attendance Roster:** Release if requested, but only if release will not undermine the state's competitive edge, e.g., don't release when the number of bidders or field of competition is particularly limited or when attendance at the meeting is mandatory. Ordinarily, the roster should not be published as part of a solicitation amendment.

\* A final tabulation, including the application of preferences, may not be available until some time after opening. Because the application of preferences may affect the ranking of bids, the original bid tab sheet may appear misleading. FOIA does not address this. If you think explaining this to the Requestor will be beneficial, feel free to do so.

## Checklists For Releasing Particular Documents

### After Notice of Intent to Award is Posted

- ☐ **Requisition** (including attached specs, diskette, and any suggested vendors)
- ☐ **Working Draft of Solicitation Document**
- ☐ **Correspondence/Email To and From Agencies Regarding Solicitation:** Depends on content; release unless content would compromise procurement process or the competitive position of involved parties. If private data is included, seek advice.
- ☐ **Correspondence to Offerors Regarding Oral Presentations**
- ☐ **Conflict of Interest, Confidentiality Certification**
- ☐ **Blank Evaluation Report (Score Sheet)**
- ☐ **Reference Checks:** These documents can reflect customers names; customer names may have been marked as confidential or trade secret.
- ☐ **Panel Member/Evaluator's Score Sheet**
- ☐ **Summary of Evaluation Scores**
- ☐ **RFQ Selection / Ranking List (for RFP or Best Value Bidding)**
- ☐ **RFP Mailing List**
- ☐ **Determinations and Findings Form/ Competitive Sealed Proposal Award**
- ☐ **Determination of Non-Responsiveness**
- ☐ **Agency Recommendation of Award**
- ☐ **Statement of Award/ Notice of Intent to Award:** Release after issued.
- ☐ **Vendor Bids and Proposals / Responses to RFQ:** Release redacted copy. *But See Step 1. A modified approach may be needed for unusual procurements.*
- ☐ **Clarification of Offers:** Release these documents as you would a vendor's bid or proposal. Documents concerning the clarification of bids are subject to disclosure. [Clarification of any bid must be documented in writing by the Procurement Officer and must be included with the bid. § 11-35-1520(8). A

similar rule appears to apply to clarification of a proposal. § 11-35-1520(8) & - 1530(1), (6).]

- **Certified Copies of Bonds:** Release these documents as you would a vendor's bid or proposal. For construction related bonds, a certified copy of a bond may be obtained from the using agency. Section 11-35-3030(3)(b). The phrase "certified copy" is defined as "[a] copy of a document or record, signed and certified as a true copy by the officer to whose custody the original is entrusted." Black's Law Dictionary 207 (5th ed. 1979).
- **Cost Calculations for an RFP using Mathematical Formula**
- **Post-Award Contract Change Orders:** Release after issued.
- **Post-Award Contract Modifications:** Release after issued.
- **Bid Samples**

## Checklists For Releasing Particular Documents

### Cancelled Solicitations

#### ☐ Bids/Proposals Were Opened

**Resolicitation Planned:** All offers are exempt from disclosure until the notice of intent to award is issued in the revised or reissued solicitation. These offers are considered documents incidental to a proposed contractual relationship until the resolicitation process is complete. At that time, the old offers should be released according to the same guidelines applicable to any other vendor's offer.

**No Resolicitation Planned:** Subject to the procedures outlined in this Policy, all offers are subject to disclosure after the solicitation is cancelled.

#### ☐ Bids/Proposals Were Not Opened

All bid or proposals should be returned unopened to Vendors. These documents are not available under FOIA. R. 19-445.2045(A), .2050(C), & 2095(B).

## MANDATORY WITHHOLDING LIST

- **Unopened Bids and Proposals:** Bids and Proposals must be unopened and secure through the time of the bid opening. Sections 11-35-1520(4) and 11-35-1530(3). If a solicitation is cancelled before Opening, all bids or proposals must be returned to the offerors unopened. R. 19-445.2045(A). See R.19-445.2095(B) (making R.19-445.2045(A) applicable to proposals). Accordingly, unopened bids are not public. Bids or proposals returned to bidders simply never become public.
- **Pre-Opening Identity of Bidders, Number of Bids, and Characteristics of Bid Samples:** "Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the state employees, and then only on a 'need to know' basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening." R. 19-445.2045 (A).
- **Information Supplied for a Determination of Responsibility:** Section 11-35-1810(3) provides special protection to documents submitted with regard to a determination of responsibility. Section 11-35-1810(3) ("Except as otherwise provided by law, information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside the offices of the board, the Office of the Attorney General, or the purchasing agency without prior written consent by the bidder or offeror."). Documents relevant to a determination of responsibility should be released or withheld consistent with both the general instructions for Step 1 and the applicable bidding instructions. According to the bidding instructions included in this Guide, vendors claims to protection under Section 11-35-1810 are waived with regard to any page of their response that isn't marked with the word "PROTECTED."
- **Confidential Information Submitted During Negotiations:** "In conducting negotiations, there must be no disclosure of any confidential information derived from proposals and negotiations submitted by competing offers." Section 11-35-1530(8) (last sentence) (emphasis added). See also R. 19-445.2095(C) ("Contents of competing offers shall not be disclosed during the process of negotiation.") (applies to proposals). This section does not define "confidential". The definition may not be limited to the definition of "privileged and confidential" found in Section 11-35-410 and may encompass information that is "confidential" only during negotiations. Negotiations may encompass the entire period from bid opening to posting of the Notice of Intent to Award.
- **Any Documents or Information Exempt from Disclosure by Statute:** Work with buyers from the using agencies. Laws specific to the areas in which they work may contain special exemptions from FOIA.

## **FOIA FORM LETTERS**

*The following form letters address FOIA requests for information received by the state from a vendor during the procurement process. The forms should be modified to fit your particular situation and to address the type of information requested.*

**FORM LETTER #1 - Acknowledging the Request**

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP #B [Bid #]

Dear:

Our office has received your letter dated \_\_\_\_\_ requesting copies of \_\_\_\_\_ with regard to the above referenced solicitation. The release of public records is governed by the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 et seq., and by the Consolidated Procurement Code, S.C. Code Ann. § 11-35-410.

*[explain the delay, whether any documents will be withheld, and why documents are being withheld, e.g., (a) considered privileged and confidential under 11-35-410, (b) considered a trade secret, (c) considered protected under 11-35-1810, etc.]*



**FORM LETTER #2 - Notifying the Vendor**

TRANSMITTED VIA FACSIMILE: (999) 999-9999  
CERTIFIED U.S. MAIL # *(insert certified mail number)*

Re: **URGENT NOTICE**

FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP #B [Bid #]

Dear:

Our office has received a letter dated \_\_\_\_\_ requesting copies of documents you submitted to this office. Please find a copy of this letter enclosed.

As stated in the original solicitation, all offerors were required to mark as "confidential" or "trade secret" or "protected" only documents that met the relevant statutory definitions. Upon review, this office has determined that documents which are subject to disclosure have been improperly marked as "confidential" or "trade secret" or "protected."

I am enclosing copies of any pages which were marked as "confidential" or "trade secret" or "protected" by your business but which we will be releasing. This material will be released seven days from the date of this letter. In addition, we will be releasing any pages from the documents listed below that were not marked as "confidential" or "trade secret" or "protected." You may pursue any available legal options you have to prevent disclosure.

[Letter should include a comprehensive list of all documents you will be releasing and a copy of every page we intend to release that the vendor marked as "confidential" or "trade secret" or "protected."]

**FORM LETTER #3 - Billing for Costs**

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP #B [Bid #]

Dear:

Our office has completed its review of your request. If your request involved copying more than fifty pages, we have billed you \$.20 per page for the cost of copying. If our staff spent more than one hour responding to your request, we have billed you for the staff time involved. If any other costs, including postage, amounted to \$2.00 or more, we have billed you for our actual costs.

The costs involved in responding to your request are as follows:

Copy Costs: \_\_\_\_\_ x \$ .20 per page = \_\_\_\_\_

Staff Time: \_\_\_\_\_ x \$ \_\_\_\_ per hour = \_\_\_\_\_

Other Costs/ Postage: \_\_\_\_\_ = \_\_\_\_\_

**Total** \_\_\_\_\_

Checks should be made payable to the *Budget and Control Board*. Your payment should be mailed to the attention of \_\_\_\_\_, at the address appearing in the letterhead. Once payment is received, we will send you the documents available.

**FORM LETTER #4 - Notice of Costs**

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP #B [Bid #]

Dear:

Our office has reviewed your request for documents. A rough estimate of the cost to complete your request is \$ \_\_\_\_\_. A breakdown of the estimated cost follows. Once this office receives your verbal or written agreement to pay for the actual cost we incur, your request will be filled.

The estimated costs involved in responding to your request are as follows:

Copy Cost: \_\_\_\_\_ x \$ .20 per page = \_\_\_\_\_

Staff Time: \_\_\_\_\_ x \$ \_\_\_\_ per hour = \_\_\_\_\_

Other Cost/ Postage: \_\_\_\_\_ = \_\_\_\_\_

**Total** \_\_\_\_\_

## **FORM LETTER #5 - Responding to the Request**

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP #B [Bid #]

Dear:

### **Paragraph #1 - Introduction**

Our office has received your letter dated \_\_\_\_\_ requesting copies of \_\_\_\_\_ with regard to the above referenced solicitation. Our release of public records is governed by the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 et seq., and by the Consolidated Procurement Code, S.C. Code Ann. § 11-35-410 et seq.

### **Paragraph #2 - Body**

*Choose among the following paragraphs, as appropriate. Letter should include a comprehensive list of all documents released. Letter should also include a list of all documents, pages, or portions thereof, that have not been released. The file must clearly reflect which documents were not released.*

#### Choice A

Enclosed are the documents you requested.

#### Choice B

Enclosed are the documents you requested. Documents exempt from disclosure or otherwise protected have been withheld.

#### Choice C - Prior to Opening

At this stage of the procurement process, only certain documents are available for public review. I have enclosed all the documents you requested that are currently available. Additional information will become available at the opening, and then again after a Notice of Intent to Award has been posted. Please let us know in writing if you would like us to contact you with regard to your request once the Notice has been posted.

#### Choice D - After Opening, Prior to Posting Notice of Intent to Award

At this stage of the procurement process, only certain documents are currently available. I have enclosed all the documents you requested that are currently available. After a Notice of Intent to Award has been posted, additional information will be available. Please let us know in writing if you would like us to contact you with regard to your request once the Notice has been posted.

### **Paragraph #3 - Billing**

The costs involved in responding to your request are as follows:

Copy Costs: \_\_\_\_\_ x \$ .20 per page = \_\_\_\_\_

Staff Time: \_\_\_\_\_ x \$ \_\_\_\_ per hour = \_\_\_\_\_

Other Costs/ Postage: \_\_\_\_\_ = \_\_\_\_\_

**Total** \_\_\_\_\_

Checks should be made payable to the *Budget and Control Board*. Your payment should be mailed to the attention of \_\_\_\_\_, at the address appearing on the letterhead.

## FOIA BIDDING INSTRUCTIONS

SUBMITTING CONFIDENTIAL INFORMATION (August 2002): (An overview is available at [www.state.sc.us/mmo/legal/foia.doc](http://www.state.sc.us/mmo/legal/foia.doc)) For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "CONFIDENTIAL" every page, or portion thereof, that Offeror contend contains information that is exempt from public disclosure because it is either (a) a trade secret as defined in Section 30-4-40(a)(1), or (b) privileged and confidential, as that phrase is used in Section 11-35-410. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the words "TRADE SECRET" every page, or portion thereof, that Offeror contends contains a trade secret as that term is defined by Section 39-8-20 of the Trade Secrets Act. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "PROTECTED" every page, or portion thereof, that Offeror contends is protected by Section 11-35-1810. All markings must be conspicuous; use color, bold, underlining, or some other method in order to conspicuously distinguish the mark from the other text. Do not mark your entire response (bid, proposal, quote, etc.) as confidential, trade secret, or protected! If your response, or any part thereof, is improperly marked as confidential or trade secret or protected, the State may, in its sole discretion, determine it nonresponsive. If only portions of a page are subject to some protection, do not mark the entire page. By submitting a response to this solicitation or request, Offeror (1) agrees to the public disclosure of every page of every document regarding this solicitation or request that was submitted at any time prior to entering into a contract (including, but not limited to, documents contained in a response, documents submitted to clarify a response, and documents submitted during negotiations), unless the page is conspicuously marked "TRADE SECRET" or "CONFIDENTIAL" or "PROTECTED", (2) agrees that any information not marked, as required by these bidding instructions, as a "TRADE SECRET" is not a trade secret as defined by the Trade Secrets Act, and (3) agrees that, notwithstanding any claims or markings otherwise, any prices, commissions, discounts, or other financial figures used to determine the award, as well as the final contract amount, are subject to public disclosure. In determining whether to release documents, the State will detrimentally rely on Offeror's marking of documents, as required by these bidding instructions, as being either "CONFIDENTIAL" or "TRADE SECRET" or "PROTECTED". By submitting a response, Offeror agrees to defend, indemnify and hold harmless the State of South Carolina, its officers and employees, from every claim, demand, loss, expense, cost, damage or injury, including attorney's fees, arising out of or resulting from the State withholding information that Offeror marked as "CONFIDENTIAL" or "TRADE SECRET" or "PROTECTED". (All references to S.C. Code of Laws.)

## **Definition of Trade Secret Under the Trade Secrets Act**

(5) "Trade secret" means:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

## **Definition of Trade Secret Under the Freedom of Information Act**

- (1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential; and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.



**BUDGET AND CONTROL BOARD PROCEDURES**  
**NEWS MEDIA CONTACTS AND FOIA REQUESTS**

**News Media Contacts**

*General Procedures:*

Employees of the Budget and Control Board should refer the news media to the Public Affairs Director in the Office of the Executive Director.

It is the responsibility of the Public Affairs Director, in conjunction with the Office of the Executive Director and office directors, to determine who will provide information directly to the news media on individual issues.

Office directors will be notified of non-routine requests for information from their offices; requests which are non-controversial will be handled routinely as determined by the parties involved.

If the Public Affairs Director is unavailable, employees should refer the news media to their office director and/or the Office of the Executive Director.

If contact with the news media is unavoidable, employees should immediately report such contact to their supervisor and/or office director. The Public Affairs Director should also be notified as soon as possible.

Employees should respond to requests from the Public Affairs Director for information and/or access to Board offices in a reasonable time frame.

*Interviews:*

All employee interviews with the news media should be arranged through the Public Affairs Director. This includes both print and broadcast media interviews via telephone or in person.

Interviews of a personal nature (i.e., not related to job function or employee responsibilities) should not be conducted in any Board office/building at any time unless specific, prior permission has been granted by the Public Affairs Director and/or Office of the Executive Director.

*Exceptions:*

Occasionally, executive staff or a designee will be in a position to talk directly with the news

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media. Executive staff is defined as one of the following: executive director, deputy executive director, assistant executive director, office director, and assistant office director. Office directors may also designate other managers to speak in the office's behalf.

Executive staff should carefully consider the appropriateness of such direct contacts with the news media, bearing in mind that these discretionary decisions will vary from issue to issue. Sensitive matters affecting the Board and its offices should always be referred to the Public Affairs Director and/or the Office of the Executive Director.

Each office director should establish procedures concerning contact with the news media, stipulating who has the authority to speak for the office and under what circumstances. News media procedures for Board offices should be in line with Board-wide procedures.

After contact with the news media, the office director and/or executive staff should notify the Public Affairs Director immediately as to the subject matter and details thereof.

### **Freedom of Information Act (FOIA) Requests**

#### *General Procedures:*

All FOIA requests shall be answered in accordance with the Freedom of Information Act (FOIA), including but not limited to time frames, definitions of releasable information, and exemptions. Matters not subject to disclosure under the FOIA will not be released without prior approval. See Sections 30-4-10 et seq. of the *South Carolina Code of Laws* (1976) as amended.

On matters which are questionable as to disclosure, legal counsel and/or the advice of the Public Affairs Director should be sought prior to releasing records under the FOIA.

Non-Board employees shall not be allowed unsupervised access to Board premises or record files unless approved by the Office of the Executive Director, office director, and/or designated staff.

Prior to the release of records or information, it is standard practice for the Budget and Control Board to inform constitutional officers, members and staff of the General Assembly, other state agencies, and Board employees that a FOIA request concerning them has been submitted. This action should in no way be construed as circumvention of the FOIA or compromising the Board's intention to disclose information which is releasable under the FOIA.

*FOIA Requests from News Media:*

News media requests under the Freedom of Information Act (FOIA) should be referred to the Public Affairs Director in the Office of the Executive Director.

It is the responsibility of the Public Affairs Director, in conjunction with the Office of the Executive Director and office directors, to determine who will provide FOIA information directly to the news media.

If appropriate, the Public Affairs Director will request information from a Board office employee regarding a FOIA request. This includes but is not limited to researching files, pulling archived materials, copying information, developing a computer program or running an existing computer program, making records available for review, and allowing file access to reporters.

Generally, FOIA requests should be handled in the course of regular office routine, with employees processing the request as time and job functions permit. However, the Board and its employees shall adhere to the time requirements of the FOIA (i.e., 15 business days, excluding Saturdays, Sundays, and legal holidays).

If information requested under the FOIA is determined to be non-releasable, the Office of the Executive Director and/or office executive staff shall provide written notification of that determination and the reasons thereof within the time requirements of the FOIA (i.e., 15 business days, excluding Saturdays, Sundays, and legal holidays).

In the event of an unavoidable delay in providing releasable information, the Public Affairs Director shall provide written approval of the FOIA request within the time requirements of the FOIA (i.e., 15 business days, excluding Saturdays, Sundays, and legal holidays) and shall forward the requested information immediately upon its availability.

If a review of Board records is requested, those records shall be pulled and made available to the news media in a convenient location. While records are under review, staff should remain with the individual making the FOIA request.

Occasionally, FOIA requests shall be designated as high priority and employees should expedite their response to them as quickly as possible. It shall be the responsibility of the Public Affairs Director to determine which FOIA requests require high priority.

All FOIA requests from the news media should be date stamped upon their receipt; if the FOIA request is received initially at a Board office, it should be date stamped at that location and immediately redirected to the Office of the Executive Director where it will be date stamped also.

FOIA requests and responses must be in writing. If a response is faxed, the original should also be mailed in response to the FOIA request. A cover letter should be part of the FOIA response.

FOIA responses may be made in a format other than a printed copy (i.e., a computer disk or tape); if so, a written cover letter should be part of the FOIA response.

*FOIA Requests from Non-News Media:*

FOIA requests originating with non-news media (i.e., vendors, attorneys, businesses, organizations, general public, etc.) which concern non-sensitive issues should be answered by the office to which it is directed or is applicable.

Offices should have written procedures and safeguards in place to ensure that FOIA requests from non-news media will be answered in an appropriate manner and in accordance with the *South Carolina Code of Laws* (1976), Sections 30-4-10 et seq., as amended.

In so far as it is applicable, procedures for FOIA requests from non-news media should be identical to the FOIA procedures regarding the news media.

FOIA requests originating from non-news media which concern sensitive matters or issues of interest to Board members and/or the Office of Executive Director should be directed to the Public Affairs Director immediately.

*Charges for FOIA Requests:*

FOIA requests should be answered without charge when the request will benefit the public interest and requires minimal and/or a reasonable amount of employee time and photocopying expense.

For requests which require substantial employee time for searching and/or photocopying, etc., a reasonable charge may be assessed the person or organization requesting the information. FOIA requests which involve computer programs/runs will also be assessed a reasonable charge.

Guidelines for determining what is reasonable are established for all Board offices as follows:

Photocopying - if the FOIA request requires copying approximately 50 pages or more at one time or a similar amount over several days, the charge would be calculated at 20 cents per page;

Employee/administrative Time - if the FOIA request requires approximately one hour or more of staff time, the charge would be based on the hourly wage of the employee(s) responding to the request.

Postage or Fax - if the FOIA request requires postage or a fax expense of approximately \$2.00 or more, the charge would be the actual cost associated with the process.

Computer Time - if the FOIA request requires development of a computer program or running an established program, the charge would be based on costs associated with the process.

Charges may be assessed for both photocopying and employee/administrative time if considerable staff time and any amount of photocopying is required to process the FOIA response.

Charges may also be assessed if one or more related FOIA requests from the same individual or organization require considerable staff time to answer.

Charges generally will not be levied for making records accessible for review unless it is determined that considerable time by knowledgeable staff will be required for reviewing documents with the requester.

Any individual making a FOIA request which will result in a charge shall be notified in advance of the approximate cost for providing that information; notification and acceptance of those charges may be verbal or in writing.

Payment in part or in full for a FOIA request may be required by the Board prior to the release of any records. If the cost of responding to the request is estimated to be \$200 or more, then a minimum deposit amounting to at least half of the estimated cost will be required. Requests for payment in advance shall be in writing.

Payment for FOIA requests should be made payable to the Budget and Control Board. Checks/money orders should be forwarded either to the Public Affairs Director or to the Office of Internal Operations. Payment will be deposited and credited to the office which provided the response to the FOIA request.

Constitutional officers, members of the General Assembly, and other state agencies shall not be charged for information or records released under the FOIA.

Charges may be waived or levied at the discretion of the Public Affairs Director or office director.